

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

VINAY KARAMSETTY,
Plaintiff,

v.

WELLS FARGO & COMPANY, et al.,
Defendants.

Case No. [12-cv-01364-JCS](#)

**ORDER GRANTING DEFENDANTS'
MOTION FOR SUMMARY
JUDGMENT, OR IN THE
ALTERNATIVE, SUMMARY
ADJUDICATION; AND OVERRULING
PLAINTIFF'S OBJECTIONS TO THE
DECLARATIONS OF LAURA HURLEY
AND KATHLEEN CAHILL SLAUGHT**

Dkt. Nos. 42, 50, 54

PUBLIC VERSION

I. INTRODUCTION

This action arises under the Employee Retirement Income Security Act of 1974 (“ERISA”), 29 U.S.C. §§ 1101 *et seq.* Plaintiff Vinay Karamsetty (“Plaintiff”) filed this lawsuit against Defendants Wells Fargo & Company (“Wells Fargo”) and Wells Fargo Company Salary Continuation Pay Plan (“the Plan”). Plaintiff, a citizen of India, had been a Wells Fargo employee since 2007. In 2009, due to Wells Fargo’s acquisition of Wachovia Mortgage and the then-current economic climate, Wells Fargo implemented a new policy to stop its employer-sponsorship of immigrant visa applications and extensions. Plaintiff resigned from his position at Wells Fargo in February 2010 before his visa expired in June 2010. Plaintiff submitted a claim for severance benefits under the Plan, and the claim was denied.

Plaintiff brings this lawsuit under ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), contending he is entitled to severance benefits because Wells Fargo’s refusal to renew his visa is a qualifying event under the Plan. Plaintiff also brings a claim under ERISA § 510, 29 U.S.C. § 1140, contending that Wells Fargo’s implementation of the policy not to renew immigrant visas

1 was intended to interfere with Plaintiff's right to severance benefits owed to him under the Plan.
 2 Defendants filed a Motion for Summary Judgment, or in the Alternative, Summary Adjudication
 3 ("Motion"), as to both claims. The Court held a hearing on the Motion on June 28, 2013, at 9:30
 4 a.m. For the reasons explained below, the Motion is GRANTED.¹

5 **II. BACKGROUND**

6 **A. Factual Background**

7 On or about July 17, 2007, Plaintiff began working as a Web Developer in Wells Fargo's
 8 Internet Services Group, earning an annual salary of approximately \$115,000. Dkt. No. 42-1
 9 (Joint Statement of Undisputed Material Facts) ("JSUF") ¶ 12. Plaintiff is a citizen of India. At
 10 the time Plaintiff commenced employment at Wells Fargo, he was eligible to work in the United
 11 States pursuant to an employer-sponsored H1-B visa that was set to expire in approximately June
 12 2010. *Id.* ¶ 13. However, in March 2009, Wells Fargo changed its policy regarding its
 13 sponsorship of employee visas (hereafter "the Policy"). *Id.* ¶ 14.

14 While there is no evidence that the full Policy has ever been documented, there is a written
 15 "Summary of the Policy" which was provided to the Human Resources ("HR") division of Wells
 16 Fargo. Declaration of Laura Hurley in Support of Defendants Motion for Summary Judgment
 17 ("Hurley Decl.") Ex. A at WF 400-03. The Summary of the Policy states that its "purpose is to
 18 provide the HR community clarification regarding visa sponsorship going forward." *Id.* The next
 19 line states that "[d]ue to the merger of the companies and the current economic climate, Wells
 20 Fargo found it necessary to re-evaluate our visa sponsorship practices." *Id.* The Summary of the
 21 Policy states that Wells Fargo will end its practice of sponsoring visa applications for new
 22 employees and visa extensions and renewals for its current employees, but also allows for limited
 23 exceptions. *See id.*

24 On March 30, 2009, HR Managers at Wells Fargo were sent an email labeled
 25 "confidential" which updated them on the progress of Wells Fargo's visa Policy. Declaration of
 26 Allison H. Goddard in Support of Plaintiff's Opposition to Defendants' Motion for Summary
 27

28 ¹ The parties have consented to the jurisdiction of the undersigned magistrate judge pursuant to 28 U.S.C. § 636(c).

Judgment (“Goddard Decl.”), Ex. 8. The email reiterated that “Wells Fargo found it necessary to re-evaluate our visa sponsorship practices due to the merger and the current economic climate.” *Id.* One part of the email read: “You may have a team member on a visa or their manager ask you about salary continuation in these situations. In the attached you will find the response that Corporate legal has provided.” *Id.*

The email included an attachment entitled “Wells Fargo Visa Sponsorship – Talking Points for TOG HR.” One of the talking points stated the following:

There have been some inquiries from team members whether they are eligible for severance if the company is making the decision not to renew or sponsor visas. The response Corporate legal has crafted for HR to use is as follows:

Eligibility for severance benefits is based on a change to a team member’s position (such as job elimination, work location or salary reduction), not the team member’s employment eligibility status. If a team member is not employment eligible, he/she cannot continue to be employed at Wells Fargo. Wells Fargo, like other employers, may chose [sic] to sponsor employees on employment-sponsored visas, such as H1-Bs, but it is not a requirement that Wells Fargo do so. The fact that Wells Fargo has chosen not to sponsor a team member for a employer-sponsor [sic] visa does not trigger salary continuation benefits.

Id. at 227-28 (emphasis in original).

Plaintiff first learned about the Policy from an article in the Wall Street Journal. Goddard Decl., Ex. 11. On April 1, 2009, Plaintiff wrote an email to a Wells Fargo HR employee inquiring whether the article was true. *Id.* The HR employee, Kate Jones, first forwarded the email to a coworker, asking: “What the heck should I say to him?” *Id.* Ms. Jones then responded to Plaintiff’s email later that day:

Vinay

There is no general email going out to H1B visa holders about letting the visa’s expire – we’re not sure where this email came from or who it went to. We are however looking at our H1B’s visa’s [sic] on a case by case basis and should have more information soon.

Goddard Decl. Ex. 12 at 239.

On April 6, 2009, Plaintiff’s supervisor Lawrence Hsu personally informed Plaintiff that

Wells Fargo decided not to renew his visa when it expired in June 2010. JSUF ¶ 15. Mr. Hsu had been instructed by HR that he should only have verbal conversations about this with Plaintiff and not to put anything in writing. Goddard Decl. Ex. 31 (Excerpts from the Deposition of Lawrence Hsu) (“Hsu Depo.”) at 35:20-24. Mr. Hsu could not recall any other time when HR had asked him not to put something in writing. Hsu Depo. at 35-37. Plaintiff was informed by memo dated April 17, 2009 that he could not post for other positions within Wells Fargo due to employer-based visa restrictions. JSUF ¶ 16.

The Summary of the Policy provides that current Wells Fargo employee visa-holders, with the help of their hiring managers and HR, may submit a request for a business case exception for Wells Fargo to sponsor the renewal of their visas. Hurley Decl. Ex. A at WF 401-02. HR managers were also told that “[w]here managers feel the role is critical to the business they may submit an updated business case,” but also stated that “**It is anticipated that very few business cases will be approved**. Recruiting Consultants will set this expectation with managers.” Goddard Decl. Ex. 8 at 227 (emphasis in original). There is a list of thirty-two Wells Fargo employees whose H-1B visas were extended even under the Policy. Hurly Decl. ¶ 9 and Ex. C thereto.

In April 2009, Mr. Hsu told Plaintiff that he would submit a business case exception on Plaintiff’s behalf. Declaration of Kathleen Cahill Slaughter in Support of Defendants’ Motion for Summary Judgment (“Cahill Decl.”), Ex. A (Excerpts from the Deposition of Vinay Karamsetty) (“Karam. Depo.”) at 69:18-20. However, Mr. Hsu delayed in doing so, apparently under the belief that it would be better to wait until it was closer to the visa expiration date in June 2010. *Id.* at 68:12-19.

On February 16, 2010, Plaintiff told Mr. Hsu that he would be resigning. Plaintiff testified that at the time he wrote his resignation email, he understood that Mr. Hsu would file the extension anytime that month. Karam. Depo. at 69:1-6. Mr. Hsu testified that he was not surprised to learn that Plaintiff was ending his employment. He stated that “[b]ecause there was a policy that H-1Bs would not be renewed..., it was certainly understandable that he was looking out for something that was viable for him.” Hsu Depo. at 58:5-12. Mr. Hsu also testified that he was

not aware of any exceptions to the Policy that were granted. Hsu Depo. at 53:12-15. Mr. Hsu had informed Plaintiff of that fact. Karam. Depo. at 69:18-20.

At Mr. Hsu's request, Plaintiff followed-up with a resignation email:

Hi Larry

Please accept this email as my two-weeks' notice of resignation. My last of work will be Mar 1st 2010.

While I have been very satisfied at Wells Fargo, I have decided to make this move to advance my career. I have enjoyed working with you and appreciate the opportunities I have been given here.

I will do my best to hand off my current projects prior to Mar 1st. Please let me know if you need my help in any other way.

Regards,

Vinay

Eggers Decl. Ex. A at 33; Goddard Decl. Ex. 32, Karam. Depo. at 57:20-25 - 58:1-2; *see also* JSUF ¶ 17. Plaintiff testified that even though the email states Plaintiff was leaving "to advance [his] career," Ms. Hsu knew the real reason Plaintiff was leaving was the expiration of his H1-B visa. Karam. Depo. at 58. Plaintiff explained that because he is not good with English phrases, he used a sample resignation letter he found on the internet to write this email. *Id.* at 58-60.

Plaintiff testified that prior to his last day of employment with Wells Fargo, he inquired at least twice whether he would receive severance benefits, and whether he would receive severance benefits if he stayed to the last day of his eligibility circumstance. JSUF ¶¶ 18-19. Plaintiff testified that the answer to these questions on both occasions was "no." *Id.*

Plaintiff's last day of work was March 2, 2010. JSUF ¶ 20. Plaintiff attended an exit interview with Evelyn Dubon on that day. *Id.* ¶ 21. During the exit interview, Plaintiff informed Ms. Dubon that he was leaving due to Wells Fargo's Policy not to renew his visa and because he had found a new job. Eggers Decl. at 34. Plaintiff told Ms. Dubon that he felt there had been a "hidden message," as he was told H1-B visa extensions would be determined on a case by case basis, but had not heard of Wells Fargo sponsorship of anyone's visa renewal or extension. Plaintiff also stated that the Policy should have been treated as a layoff. *Id.* Because he had heard that the Policy was implemented due to the economic conditions and merger with Wachovia

1 Mortgage, Plaintiff believed those affected by the Policy should have been considered to have
2 experienced a displacement of position. *Id.* Plaintiff also stated that he felt like Wells Fargo
3 discriminated against foreign nationals. *Id.* at 35.

4 At the interview, Plaintiff also inquired whether he would be eligible for severance
5 benefits. Ms. Dubon said she did not believe so but would follow-up. Weeks later, Plaintiff wrote
6 an email to Ms. Dubon asking about the possibility of benefits. Goddard Decl. Ex. 17 at 249.
7 Plaintiff was directed to communicate with Kelly Francovich since Ms. Dubon was no longer
8 working with the Internet Services Group. *Id.* Ms. Francovich wrote Plaintiff an email on
9 September 28, 2010:

10 Vinay,

11 Team members become eligible for Wells Fargo's salary
12 continuation plan when their positions are eliminated or there is a
13 qualifying event that meets the definition of a substantial position
14 change.

15 This is not the case with non renewal of H1B visas, therefore, you
16 are not eligible to receive severance pay under our plan.

17 Goddard Decl. Ex. 17 at 248.

18 **B. Wells Fargo's Displacement Selection Process**

19 Wells Fargo laid-off thousands of workers after acquiring Wachovia Mortgage. *See*
20 Eggers Decl. ¶¶ 5-6. HR employees at Wells Fargo were instructed to watch a two-hour
21 PowerPoint lecture entitled "Selection Guidelines for Displacement Activities" to learn how to
22 select which employees to include in the displacement process. *See* Goddard Decl. Ex. 6
23 (Selection Guidelines for Displacement Activities). "Selection Process" is defined in the
24 PowerPoint as the "[m]ethod and process for identifying and selecting team members for
25 displacement." *Id.* at 10. The objectives of this training were to teach HR employees appropriate
26 selection methods and criteria, as well as the triggering events under the Plan which entitled
27 employees to benefits. *Id.* at 7.

28 HR employees were also provided with a document entitled "Displacement Selection
Process for Team Members on Employer-sponsored Visas and Student Visas." *See* Hurley Decl.
Ex. B. This document states that it "describes the procedures for HR to use, in conjunction with

the ‘Selection Guidelines for Displacement Activities,’ when the displacement selection process involves team members on employer sponsorships and certain student visas.” *Id.* The document instructs HR employees to take certain steps “[a]fter HR has finished the evaluation of determining the appropriate candidate pool[.]” *Id.*

HR employees are first instructed to identify which Wells Fargo employees require visas and to determine their corresponding expiration dates. *Id.* Then, HR employees are instructed to “[r]eview the work authorization expiration date to determine if the team member should be included in the selection process.” *Id.* at 414. HR employees are instructed to follow the normal selection process for employees whose work authorizations expire *after* the date of the anticipated Notice Period,² and are told that these employees will be eligible to receive severance benefits. *Id.*; *see also* Eggers Decl. ¶ 6 (“the Plan paid lump sum severance to individuals who held H1-B visas, whose visa expiration date followed their lump sum severance payout under the Plan.”). HR employees are also instructed to exclude from the selection process employees whose work authorizations expire *before* the end of the anticipated Notice Period, and further states that those employees will *not* be eligible for severance benefits. *See* Hurley Decl. Ex. B. at 414.

The “Displacement Selection Process for Team Members on Employer-sponsored Visas and Student Visas” ends with a “Q & A.” One “Q & A” is as follows:

Is a team member eligible for SCL benefits if management decides not to pursue a visa renewal or new visa sponsorship for that team member?

Answer: No, the decision to not renew or seek a new visa does not equate to job elimination. The situations that qualify as a job elimination for the purpose of determining eligibility for SCL benefits are described in the “Selection Guidelines for Displacement Activities.

Goddard Decl. Ex. 7 at 417 (emphasis in original).

C. The Plan

² As discussed further below, Notice Period is defined in the Wells Fargo & Company Salary Continuation Pay Plan as “the period of time communicated to the Participant in a written notice of a Qualifying Event.” JSUF ¶ 5. A “Qualifying Event,” in turn, is defined as a Position Elimination or Substantial Position Change. Eggers Decl. Ex. A at 133.

The Wells Fargo & Company Salary Continuation Pay Plan (“the Plan”) is designed to provide income to plan participants in the event of job displacements. Declaration of Stacey Eggers (“Eggers Decl.”) Ex. A at 131. The Plan provides that a “Participant shall qualify for Salary Continuation Pay if the Participant (1) experiences a Qualifying Event, (2) he/she executes the Agreement and Release Provided pursuant to Section 4.3 of this Plan, and (3) he/she is not disqualified under Section 3.2.” JSUF ¶ 7. The Parties dispute whether the first and third prongs – whether Plaintiff experienced a Qualifying Event and whether Plaintiff is disqualified under Section 3.2.

The Summary Plan Description for the Plan states that “[t]here are two events that may qualify [a participant] for salary continuation pay under the Plan – a Position Elimination or a Substantial Position Change.” Eggers Decl. Ex. A at 133. Plaintiff does not argue that there was a Substantial Position Change entitling him to benefits under the Plan. Rather, he argues that there was a Position Elimination, which is defined as the “[e]limination of all or part of the position held by a Participant or any other form of reduction in force initiated by [Wells Fargo] affecting a Participant’s position.” JSUF ¶ 8.

Section 3.2 states several “Disqualifying Events” which disqualify a participant from receiving benefits under the Plan. One such disqualifying event is when “the Participant commences employment outside of the Company ... prior to completion of the Participant’s Notice Period.” JSUF ¶ 6. Another disqualifying event is when “the Participant’s employment with the Company ... is terminated prior to completion of the Notice Period[.]” *Id.* Section 2.16 of the Plan defines the term “Notice Period,” in relevant part, as “the period of time communicated to the Participant in a written notice of a Qualifying Event. Generally, the Notice Period is not less than 60 days; however there may be business circumstances in which a Participant’s business unit provides a shorter Notice Period.” *Id.* ¶ 5.

[REDACTED]. Eggers Decl. ¶ 4. During 2010, the Plan Administrator considered 23 claims and 10 appeals of claim denials requesting entitlement to severance benefits. *Id.* All claims and appeals filed in 2010 were denied. Goddard Decl. Ex. 4 (Defendants’ Objections and Responses to Interrogatories) at 8:2. [REDACTED]. Eggers Decl. ¶ 5. All claims and appeals

1 filed in 2011 were denied. Goddard Decl. Ex. 4 at 8:5.

2 **D. Plaintiff's Claim for Benefits under the Plan**

3 Through his counsel, Plaintiff submitted a claim for severance under the Plan on December
4 21, 2010. JSUF ¶ 25. The claim alleged that Wells Fargo's non-renewal of Plaintiff's visa
5 constituted a Position Elimination, a Qualifying Event entitling him to severance under the Plan.
6 *Id.* ¶ 26. The claim states, in relevant part:

7 Mr. Karamsetty continued working at Wells Fargo until March 1,
8 2010, when he was constructively terminated by Wells Fargo. As
9 Wells Fargo is no doubt aware, refusing to renew an H1B visa is
10 equivalent to a termination, giving Mr. Karamsetty no other choice
but to seek alternative employment so that he could preserve his
lawful immigration status.

11 Eggers Decl. Ex. A at 45.

12 The Plan Administrator delegated discretionary authority to Cha Sanders, a member of
13 Wells Fargo's Corporate Relations Services Department, to evaluate Plaintiff's claim. JSUF ¶ 27.
14 By letter to Plaintiff's attorney dated April 22, 2011, Ms. Sanders denied the claim. Eggers Decl.
15 Ex. A at 40. Ms. Sanders wrote, in relevant part:

16 Under the Plan, a Position Elimination is a Qualifying Event. Wells
17 Fargo did not eliminate Mr. Karamsetty's position. On the contrary,
18 once Mr. Karamsetty's visa expired, he would no longer be able to
19 fulfill the requirements of his position. Wells Fargo does not
20 guarantee visa extensions and wanted to provide Mr. Karamsetty
adequate notice of the fact that his visa would not be extended.
Also, it is important to note that Wells Fargo had to hire a contractor
to perform the duties of Mr. Karamsetty's position following his
21 resignation.

22 *Id.* at 41. Ms. Sanders also wrote: "Further, Mr. Karamsetty's decision to resign effective March
23 1, 2010 disqualified him from consideration for Plan benefits." *Id.* at 42.

24 By letter dated June 20, 2011, Plaintiff appealed the denial of his claim with the assistance
25 of counsel. Eggers Decl. Ex. A at 106-08. Plaintiff argued that the Plan Administrator erred in
26 concluding that Wells Fargo's decision not to renew Plaintiff's H1B visa was not a "Position
27 Elimination," which is defined as "an elimination of your job *or any other form of reduction in*
28 *force initiated by Wells Fargo affecting a Participant's position.*" JSUF ¶ 8 (emphasis added).

Plaintiff argued that the “Plan Administrator admits that Mr. Karamsetty’s job was eliminated in her denial letter, since Wells Fargo hired a contractor, not a full-time employee, to replace Mr. Karamsetty.” *Id.* at 107. Plaintiff also argued that the Plan Administrator ignored the second clause of the definition of a “Position Elimination,” because “Wells Fargo’s decision not to renew Mr. Karamsetty’s and other similarly situated employees’ HIB visas in early 2009 constituted a reduction in force.” Eggers Decl. Ex. A at 106.

The Plan Administrator delegated discretionary authority to the members of the Wells Fargo & Company Salary Continuation Pay Plan Appeals Committee (“Committee”) to adjudicate appeals from a denial of benefits. *See* JSUF ¶ 11. On September 1, 2011, the Committee denied Plaintiff’s appeal, writing: “[T]he Committee could not find any support for your position that Mr. Karamsetty’s position as a Web Developer had been eliminated, thus triggering a Qualifying event.” Eggers Decl. Ex. A at 251. The Committee reasoned that “contractors can be used to fulfill job duties at the business unit’s discretion and its decision to move forward with a contractor, with the same or similar duties, does not deem a job eliminated.” *Id.* at 252. The Committee further reasoned that the “[s]ubsequent posting of the job further supports the Committee’s opinion that Mr. Karamsetty’s position was not eliminated through a reduction in force.” *Id.* The Committee also found that Plaintiff “lost his ‘participant’ status when he tendered his voluntary resignation of employment on February 16, 2010,” thus removing him from eligibility under the Plan. *Id.* at 253. *Id.*

Handwritten notes of the Committee are also in evidence before the Court. The handwritten notes state: “Decision consistent with change in visa sponsorship policy.” Goddard Decl. Ex. 27 at 279.

E. The Declaration of Laura Hurley

Defendants have submitted the Declaration of Laura Hurley. Ms. Hurley is the Executive Vice President of Human Resources for Wells Fargo, and has worked for Wells Fargo for approximately thirteen years. Hurley Decl. ¶ 1. Ms. Hurley states in her declaration that in 2008 and 2009, she “was present during discussions on development and implementation of Wells Fargo’s revised visa sponsorship policy.” *Id.* ¶ 2. Ms. Hurley writes the following in her

1 declaration about the intended purpose of the Policy:

2 The purpose of the Policy was to decrease Wells Fargo's reliance on
3 employer-sponsored visas by utilizing the overall increased talent
4 pool of individuals within Wells Fargo as a result of its merger with
5 Wachovia Mortgage, and within the United States, who did not
6 require visa sponsorship to work within the United States. Wells
7 Fargo implemented the Policy to ensure that visas were sponsored
8 and/or renewed only in cases of substantiated business necessity.
9 (*Id.* ¶ 3.)

10 The Policy was not intended to interfere with the rights of any H1-B
11 visa holder to become eligible for severance under the Wells Fargo
12 & Company Salary Continuation Plan ("Plan"). (*Id.* ¶ 4.)

13 I am not aware of any consideration of Plan benefits and/or
14 eligibility as a factor in Wells Fargo's decision to implement the
15 Policy. (*Id.* ¶ 5.)

16 I am not aware of any consideration of potential Plan severance
17 payouts to H1-B visa holders as a factor in Wells Fargo's decision to
18 implement the Policy. (*Id.* ¶ 6.)

19 When asked at her deposition to clarify her involvement with the Policy, Ms. Hurley testified that
20 she was "involved" in the discussions around the Policy, but "wasn't involved in drafting the
21 policy" and did not have a decision-making role in developing the policy. Hurley Depo. at 50:17-
22 19; 54:13-15. Ms. Hurley stated that she "doubt[ed] that [she] participated in all of the
23 discussions" about the Policy. *Id.* at 53:14-15.

24 **F. The Motion for Summary Judgment**

25 Defendants move for summary judgment on Plaintiff's claim for benefits under ERISA §
26 502(a)(1)(B). Defendants argue there was no abuse of discretion when Plaintiff was denied
27 severance benefits Plaintiff did not experience a qualifying event that would have triggered
28 entitlement to benefits under the Plan. Defendants argue that Plaintiff voluntarily terminated his
employment with Wells Fargo when he resigned in February 2010, and that even if Plaintiff had
stayed until the expiration of his visa in June 2010, he would still not have been entitled to
severance because the expiration of his visa was not a qualifying event under the Plan.

Defendants also move for summary judgment on Plaintiff's claim under ERISA § 510 on
two grounds. First, Defendants argue the claim is time-barred and equitable tolling does not

1 apply. Second, Defendants contend the Section 510 claim fails on its merits because there is no
 2 evidence Wells Fargo discriminated against Plaintiff for the purpose of interfering with his
 3 benefits. Defendants argue that Plaintiff cannot make out a prima facie case of discrimination, and
 4 that even if he could, Plaintiff cannot establish that Defendant's legitimate, nondiscriminatory
 5 reason for implementing the policy is pretext for discrimination.

6 Plaintiff opposes the Motion on all grounds.

7 **III. DISCUSSION**

8 **A. Plaintiff's Evidentiary Objections**

9 Plaintiff objects to the Court's consideration of paragraphs 3 - 6 of the Declaration of
 10 Laura Hurley on the basis that Ms. Hurley lacks personal knowledge. In paragraph 3, Ms. Hurley
 11 articulates Wells Fargo's purported legitimate, non-discriminatory reason for implementing the
 12 Policy, and in paragraph 4, states that the Policy was "not intended to interfere with the rights of
 13 any H1-B visa holder to become eligible for severance." Hurley Decl. ¶¶ 3-4. Ms. Hurley
 14 testified in her deposition that she did not draft the Policy, did not participate in all of the
 15 discussions surrounding its development, and had no decision-making role in its development.
 16 Hurley Depo. at 50:17-19; 53:14-15; 54:13-15. Plaintiff therefore argues that Ms. Hurley lacks
 17 personal knowledge to testify to the Policy's purpose and intent. Plaintiff states that paragraphs 5
 18 and 6 are "objectionable" because Ms. Hurley fails to state any affirmative facts, but rather
 19 testifies that she is "not aware" of any consideration of benefits or severance as a factor in Wells
 20 Fargo's decision to implement the Policy. Hurley Decl. ¶¶ 6-7.

21 Defendants argue that Ms. Hurley has established her personal knowledge because she also
 22 writes in her declaration that she was "present during discussions on development and
 23 implementation of" the Policy. Hurley Decl. ¶ 2. Defendants contend that under Plaintiff's
 24 theory, Wells Fargo cannot state the purpose of the Policy unless each individual that participated
 25 in discussions about the Policy offers their own testimony about its purpose and intent.
 26 Defendants further argue that Plaintiff's objections to paragraphs 5 and 6 should be overruled
 27 because Plaintiff cites no legal authority to support these objections.

28 The Court agrees with Defendants. As to paragraphs 5 and 6, Plaintiff has not articulated

any legal basis for exclusion. As to paragraphs 3 and 4, the Court finds that Ms. Hurley has established personal knowledge because was “present” during the “discussions on and implementation of” the Policy. Hurley Decl. ¶ 2. Moreover, “[p]ersonal knowledge may be inferred from a declarant’s position” in a company. *In re Kaypro*, 218 F.3d 1070, 1075 (9th Cir. 2000). Ms. Hurley is the Executive Vice President of Human Resources for Wells Fargo, and has worked for Wells Fargo for approximately thirteen years, Hurley Decl. ¶ 1, thus further establishing her personal knowledge.

Plaintiff also objects to the Declaration of Kathleen Cahill Slaughter in Support of Defendants’ Reply in Support of their Motion for Summary Judgment on grounds of relevance and prejudice. The Court did not rely on this declaration and supporting exhibits, and therefore, need not decide this issue.

B. Legal Standard

Plaintiff’s two ERISA claims require somewhat distinct legal standards. With respect to Plaintiff’s claim under ERISA § 510, the Court applies traditional principles of summary judgment. Such principles require that “summary judgment must be denied if, ‘viewing the evidence in the light most favorable to the non-moving party,’ there are genuine issues of material fact.” *Nolan v. Heald College*, 551 F.3d 1148 (9th Cir. 2009) (quoting *Leisek v. Brightwood Corp.*, 278 F.3d 895, 898 (9th Cir. 2002)). Summary judgment is appropriate “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed.R.Civ.P. 56(a).

With respect to the claim for benefits under ERISA § 502(a)(1)(B), however, courts apply the abuse of discretion standard if the plan terms “unambiguously provide discretion to the administrator.” *Abatie v. Alta Health & Life Ins. Co.*, 458 F.3d 955, 963 (9th Cir. 2006). Section 5.1 of the Plan confers discretionary authority to the Plan Administrator, and the Plan Administrator delegated such authority to the Committee to review Plaintiff’s appeal. *See* JSUF ¶¶ 10-11. Thus, the Court reviews their decisions for abuse of discretion, and will find an abuse of discretion if the Plan Administrator and/or Committee “(1) renders a decision without explanation, (2) construes provisions of the plan in a way that conflicts with the plain language of the plan, or

(3) relies on clearly erroneous findings of fact.” *Boyd v. Bert Bell/Pete Rozelle NFL Players Ret. Plan*, 410 F.3d 1173, 1178 (9th Cir. 2005).

“The manner in which a reviewing court applies the abuse of discretion standard, however, depends on whether the administrator has a conflicting interest.” *Montour v. Hartford Life & Acc. Ins. Co.*, 588 F.3d 623, 629 (9th Cir. 2009). There is a structural conflict of interest in this case because Wells Fargo acts as both the insurer of the Plan, as well as the Plan Administrator. *Id.* at 630 (“since it is also the insurer, benefits are paid out of the administrator’s own pocket, so by denying benefits, the administrator retains money for itself.”). The Supreme Court has stated that a “conflict must be weighed as a factor in determining whether there is an abuse of discretion.” *Firestone Tire and Rubber Company v. Brunch*, 489 U.S. 101, 115 (1989). Courts in the Ninth Circuit are instructed to weigh a conflict of interest “based on the degree to which the conflict appears improperly to have influenced a plan administrator’s decision.” *Montour*, 588 F.3d at 631. Traditional rules of summary judgment apply in determining the extent to which a conflict of interest influenced an administrator’s decision. *Nolan v. Heald College*, 551 F.3D 1148, 1154 (2009).

C. ERISA § 502(a)(1)(B), 29 U.S.C. § 1132

Two issues must be decided with regard to Plaintiff’s first claim for benefits under Section 502(a)(1)(B). The first issue is what effect, if any, the structural conflict of interest should have on this Court’s review of the claim. The second issue is whether the Plan Administrator and review Committee abused their discretion in denying Plaintiff’s claim for benefits under the Plan, taking into account “the degree to which the conflict appears improperly to have influenced” their decisions. *Montour*, 588 F.3d at 631.

1. Conflict of Interest

The Ninth Circuit has provided guidance on the extent to which a conflict of interest should be weighed when reviewing for abuse of discretion. “The level of skepticism ... may be low if a structural conflict of interest is unaccompanied, for example, by any evidence of malice, of self-dealing, or of a parsimonious claims-granting history.” *Abatie*, 458 F.3d at 968. A court may also give a conflict less weight if the administrator takes active steps to reduce potential bias

1 and promote accuracy. *Metropolitan Life Ins. Co. v. Glenn*, 554 U.S. 105, 117 (2008). By
 2 contrast, courts should weigh a “conflict more heavily if, for example, the administrator provides
 3 inconsistent reasons for denial, ... fails adequately to investigate a claim or ask the plaintiff for
 4 necessary evidence, ... fails to credit a claimant’s reliable evidence, ... or has repeatedly denied
 5 benefits to deserving participants by interpreting plan terms incorrectly or by making decisions
 6 against the weight of evidence in the record.” *Abatie*, 458 F.3d at 968-69.

7 In this case, there is some evidence that the structural conflict of interest influenced the
 8 Plan Administrator and review Committee. Before Plaintiff ever submitted his claim for benefits,
 9 and even before Plaintiff learned about the Policy, Wells Fargo had decided that some employees
 10 affected by the Policy were not entitled to severance benefits.³ This is clear from the “talking
 11 points” email sent to HR Managers on March 30, 2009, wherein HR Managers were instructed to
 12 use “[t]he response Corporate legal has crafted” when asked whether those affected by the Policy
 13 would be entitled to severance benefits. *See* Goddard Decl. Ex. 8 at 227-28. The final sentence of
 14 the “crafted” response accurately reflects Wells Fargo’s position: “*The fact that Wells Fargo has*
 15 *chosen not to sponsor a team member for a employer-sponsor visa does not trigger salary*
 16 *continuation benefits.*” *Id.* Wells Fargo’s predetermination that those affected by the Policy were
 17 not entitled to benefits is also clear from the “Q & A” attached to the “Displacement Selection
 18 Process for Team Members on Employer-sponsored Visas and Student Visas,” which states that
 19 employees are not eligible for benefits if management does not pursue visa renewal because “the
 20 decision to not renew or seek a new visa does not equate to job elimination.” Goddard Decl. Ex. 7
 21 at 417.

22 In *Jebian v. Hewlett-Packard*, the Ninth Circuit held that “[d]eference to an exercise of
 23 discretion requires discretion actually to have been exercised.” 349 F.3d 1098, 1106 (9th Cir.
 24

25 ³ To clarify, some visa-holder employees were entitled to benefits—those employees who
 26 were selected for displacement and whose visas expired after the date of the anticipated Notice
 27 Period. *See* Hurley Decl. Ex. B; Eggers Decl. ¶ 6 (“the Plan paid lump sum severance to
 28 individuals who held H1-B visas, whose visa expiration date followed their lump sum severance
 payout under the Plan.”).

2003). The plan administrator in *Jebian* had failed to grant or deny a claim for benefits before the date the claim for benefits was “deemed denied” by the terms of the plan. The court held that de novo review applied because even though the plan terms conferred discretionary authority upon the plan administrator, the plan administrator had failed to use that discretionary authority. *Id.* at 1104 (“Decisions made outside the boundaries of conferred discretion are not exercises of discretion, the substance of the decisions notwithstanding.”).

In *Jebian*, the opportunity to use discretion had been precluded by the terms of the plan. The difference in this case is that, although Wells Fargo predetermined that employees such as Plaintiff would not be eligible for benefits, the Plan Administrator and Committee still purported to make the decision to deny Plaintiff’s claim in particular. That is to say, although a company-wide decision had been made, the Plan Administrator and Committee still had the opportunity as independent ERISA fiduciaries to exercise their discretion—going against the company policy—and award Plaintiff benefits. Thus, the Court finds that unlike in *Jebian*, the abuse of discretion standard still applies. The question is therefore: *How much discretion did the Plan Administrator and Committee exercise considering the fact Wells Fargo had already determined that employees in Plaintiff’s position affected by the Policy were not entitled to benefits?*

There are indications that the Plan Administrator and Committee were somewhat influenced by Wells Fargo’s previous determination that those affected by the Policy were not entitled to benefits. The Committee’s handwritten notes shows that the Committee considered the fact that their decision to deny Plaintiff benefits was “consistent with change in visa sponsorship policy.” Goddard Decl. Ex. 27 at 279. This is at least some indication that the Committee’s decision was influenced by Wells Fargo’s previous determination that those affected by the Policy were not entitled to benefits. Accordingly, the Court finds that the structural conflict of interest in this case weighs somewhat against the Plan Administrator and Committee.

2. Whether Plaintiff is Entitled to Severance Benefits under the Plan

The Parties agree that Plaintiff is only entitled to severance benefits under the Plan if Plaintiff experienced a “Qualifying Event” as defined by the Plan. Thus, the question is whether Plaintiff experienced a “Position Elimination,” which is defined by the Plan as the “[e]limination

1 of all or part of the position held by a Participant or any other form of reduction in force initiated
2 by [Wells Fargo] affecting a Participant's position." JSUF ¶ 8.

3 The Plan Administrator and Committee found that Plaintiff did not experience a "Position
4 Elimination" by reasoning that Wells Fargo did not eliminate Plaintiff's position by enacting the
5 Policy. Rather, they found that once Plaintiff's visa expired, Plaintiff would no longer be able to
6 fulfill a requirement of the job that he have legal status to work in the United States. The Plan
7 Administrator and Committee both cited the fact that after Plaintiff submitted his resignation,
8 Wells Fargo had to hire a contractor to fill Plaintiff's position, which is evidence that Plaintiff's
9 *particular job* was not eliminated. Eggers Decl. Ex. A at 41, 253. The Court finds that the Plan
10 Administrator and the Committee did not abuse their discretion.

11 Plaintiff argues that the Plan Administrator and Committee abused their discretion by
12 ignoring the second part of the definition of a "Position Elimination," which includes "any other
13 form of reduction in force initiated by [Wells Fargo] affecting a Participant's position." JSUF ¶ 8.
14 However, any reduction in force as a result of the Policy did not alter the "position." The evidence
15 shows that after Plaintiff submitted his resignation, Wells Fargo posted to fill the position and then
16 filled it with a contractor. The Policy, therefore, had no effect on Plaintiff's "position" at all.
17 Accordingly, finding that Plaintiff did not experience a Qualifying Event and was not owed
18 benefits under the Plan was not an abuse of discretion, even considering the conflict of interest in
19 this case.

20 **D. ERISA § 510, 29 U.S.C. § 1140**

21 The Court now turns to Plaintiff's second claim for relief under ERISA § 510(a)(1)(B), 29
22 U.S.C. § 1140, which provides, in relevant part:

23 It shall be unlawful for any person to discharge, fine,
24 suspend, expel, discipline, or *discriminate* against a
25 participant ... *for the purpose of interfering* with the
26 attainment of any right to which such participant may
become entitled under [an ERISA employee benefit] plan....

27 29 U.S.C. § 1140 (emphasis added). Defendants move for summary judgment on Plaintiff's
28 Section 510 claim on two separate grounds. First, Defendants argue that the claim is time barred.

Second, Defendants contend the Section 510 claim fails on the merits.

1. Whether Plaintiff's Section 510 Claim is Time-Barred

Section 510 does not contain its own statute of limitations, thus the Court must apply the most analogous state law statute of limitations period. *Burrey v. Pacific Gas & Electric Company*, 159 F.3d 388, 396 (9th Cir. 1998). The parties agree that the two-year statute of limitations from California Code of Civil Procedure § 335.1 applies to Plaintiff's Section claim. *See* Motion at 13-14; Opp. at 16:16; *Burrey*, 159 F.3d at 396.⁴ The Parties disagree, however, on the date the cause of action accrued, as well as whether equitably tolling applies to Plaintiff's claim.⁵

i. Accrual of Plaintiff's Section 510 Claim

Defendants contend that Plaintiff's cause of action accrued in April 2009—nearly three years before Plaintiff filed this lawsuit on March 19, 2012—when Plaintiff's manager Mr. Hsu informed Plaintiff of Wells Fargo's Policy not to renew H-1B visas. It is undisputed that on April 6, 2009, Ms. Hsu informed Plaintiff that Wells Fargo decided not to renew his visa. JSUF ¶ 15. In the alternative, Defendants contend that the latest dates in which Plaintiff's cause of action could have possibly accrued are on February 16, 2010, when Plaintiff submitted his resignation email, or on March 2, 2010, the date Plaintiff's employment at Wells Fargo was terminated. Defendants note that these two later dates are still more than two years before March 19, 2012.

Nevertheless, Plaintiff contends that he was not aware of the “discriminatory intent” behind Wells Fargo's nonrenewal Policy until he was unequivocally informed by Wells Fargo that his termination as a result of visa expiration did not entitle him to severance benefits. Plaintiff therefore argues that his Section 510 claim accrued on September 28, 2010, the day Ms. Francovich informed Plaintiff in an email that he would not receive severance benefits. *See*

⁴ In *Burrey*, the Ninth Circuit reasoned that a claim arising under ERISA § 510 was most analogous to a state law claim for wrongful termination in violation of public policy. *Id.* at 396-97. At the time *Burrey* was decided, the one-year statute of limitations from California Code of Civil Procedure § 340(3) applied to such claims. Since 2002, however, the two-year statute of limitations from California Code of Civil Procedure § 335.1 applies to such claims.

⁵ Plaintiff also argues that Defendants should be equitably estopped from asserting a statute of limitations defense. The Court does not reach this argument because Plaintiff's claim will be equitably tolled.

1 Eggers Decl. Ex. A at 45.

2 Federal common law establishes the accrual date of a claim under a federal statute. *See*
3 *Tolle v. Carroll Touch, Inc.*, 977 F.2d 1129, 1138 (7th Cir. 1992) (applying federal common law
4 to determine the accrual date of a cause of action under section 510); *Pouncil v. Tilton*, 704 F.3d
5 568, 573-74 (9th Cir. 2012) (applying federal common law to determine the accrual date of a
6 cause of action under 42 U.S.C. § 1983). Under federal law, “a claim accrues when the plaintiff
7 knows or has reason to know of the injury which is the basis of the action.” *Azer v. Connell*, 306
8 F.3d 930, 936 (9th Cir. 2002).

9 While the Ninth Circuit has not explicitly considered when a cause of action under Section
10 510 accrues, at least three of its sister circuits have. *See Tolle v. Carroll Touch, Inc.*, 977 F.3d at
11 1138-41; *Jakimas v. Hoffman-La Roche, Inc.*, 483 F.3d 770, 777-80 (3rd Cir. 2007); *Edes v.*
12 *Verizon Commc'ns, Inc.*, 417 F.3d 133, 139 (1st Cir. 2005). The First, Third and Seventh Circuits
13 agree that a cause of action under Section 510 accrues when a plaintiff discovers the unlawful act
14 prohibited by Section 510. *See id.* The courts were guided by the Supreme Court’s decision in
15 *Delaware State College v. Ricks*, 449 U.S. 250 (1980), where the Court held that a cause of action
16 under Title VII accrues at the time an employment decision is made, not when the injury or
17 consequences of that decision are felt. *See id.* at 261. The Third Circuit was also persuaded by
18 *Chardon v. Fernandez*, 454 U.S. 6 (1981), where the Supreme Court held that the accrual rule in
19 *Ricks* applied to a § 1983 claim such that the one year limitations period began to run when notice
20 of termination was given, not on date when employment was terminated. *Jakimas*, 483 F.3d at
21 779.

22 In *Tolle*, the Seventh Circuit considered whether the plaintiff’s claim under Section 510
23 accrued when the plaintiff was terminated, or rather when the plaintiff was denied benefits. The
24 court rejected the argument that a cause of action under Section 510 necessarily accrues upon the
25 denial of benefits, reasoning that “the different nature of Section 510 calls for a different focus
26 when determining when claims under [Section 510] accrue.” *Id.* at 1139. The court continued:

27 Because the relevant portions of Section 510 aim to prevent
28 employers and other persons from *taking action* for purposes of
preventing a participant from or punishing a participant for

exercising his or her rights under a plan, the accrual of Section 510 claims turns on *such actions*.

Id. at 1140 (emphasis added). The court held that “it is the *termination* that was allegedly done for the *purposes* of avoiding payment of benefits and Tolle’s discovery of this action which serve as the basis for accrual.” *Id.* (emphasis in original).

While the relevant unlawful act in *Tolle* was the plaintiff’s termination, the relevant unlawful act in this case is Wells Fargo’s enactment of an allegedly discriminatory Policy. *See Ricks*, 449 U.S. at 261 (alleged illegal act was racial discrimination in a tenure decision). Section 510 prohibits employers from taking a variety of actions (“discharge, fine, suspend, expel, discipline, or discriminate against”) for the “purpose of interfering with” benefits to which a participant is entitled. *See* 29 U.S.C. § 1140. The accrual of a Section 510 turns on the time in which a plaintiff learns of the discharge, fine, suspension, expulsion, discipline, or discriminatory act which was allegedly undertaken to interfere with the plaintiff’s benefits. *Tolle*, 977 F.2d at 1140. It is undisputed that Plaintiff has been aware of the Policy since April 2009. Plaintiff did not file the instant action until March 19, 2012, more than two years after April 2009. By that time, the statute of limitations had run.

Furthermore, Plaintiff’s argument that the cause of action did not accrue until September 28, 2010 when Plaintiff was informed again that he would not receive severance benefits makes little sense. First, Plaintiff learned of this fact not later than his last day of work—March 2, 2010—over two years before this action was filed. Moreover, the crux of Plaintiff’s argument is that the denial of severance benefits triggered accrual of the claim as opposed to the unlawful act prohibited by Section 510. Such reasoning was rejected by the *Tolle* court, and will be rejected here because accrual turns “on the discriminatory act, not when the effects of that act are felt.” *Jakimas*, 485 F.3d at 779.

ii. Equitable Tolling

Even if Plaintiff’s Section 510 claim accrued more than two years before this lawsuit was filed, it will not be time-barred if the equitable tolling doctrine applies. “Along with the statute of limitations period, the court borrows the state’s equitable tolling rules, absent a reason not to do so.” *Davison v. Columbia/HCA Healthcare Corp.*, 241 F.3d 1131 (9th Cir. 2001) (*en banc*).

Under California law, a three-pronged test determines whether a plaintiff's cause of action should be equitably tolled. "The three elements of the test are: (1) timely notice to the defendant in filing the first claim; (2) lack of prejudice to the defendant in gathering evidence to defend against the second claim; and (3) good faith and reasonable conduct by the plaintiff in filing the second claim." *Lucchesi v. Bar-O Boys Ranch*, 353 F.3d 691, 694-95 (9th Cir. 2003) (citing *Collier v. City of Pasadena*, 142 Cal.App.3d 917, 924 (1983)).

Plaintiff contends that his Section 510 claim should be equitably tolled because on December 21, 2010, Plaintiff submitted his claim for severance benefits under the Plan, which was required before Plaintiff could file a claim under ERISA § 502(a)(1)(B) for benefits owed to him under the Plan. Plaintiff argues that since he submitted his claim for severance benefits, Defendants have been on notice of the need to investigate the lawfulness of its visa nonrenewal Policy. Plaintiff bases his argument on the well-settled rule that "the running of the limitations period is tolled when an injured person has several legal remedies and, reasonably and in good faith, pursues one." *Elkins v. Derby*, 12 Cal.3d 410, 414 (1974) (internal citations omitted) (holding that the statute of limitations against an employer was tolled while an employee pursued his workers' compensation claims arising out of the same accident). Plaintiff also argues that Defendants have suffered no prejudice, that Plaintiff's conduct was reasonable and in good faith, and that it would be inequitable to dismiss Plaintiff's Section 510 claim.

Defendants contend, however, that Plaintiff has failed to meet the "threshold requirement" of showing that his claims under Section 502 and Section 510 are based upon the same wrong. Defendants note that "California has long refused to apply the equitable tolling doctrine to toll the statute of limitations on a claim for a distinct wrong that was not the basis of the earlier proceeding." *Daviton*, 241 F.3d at 1141. Defendants further contend that the Ninth Circuit has held that Sections 502 and 510 are designed to "remedy different wrongs; one section corrects any improper action taken with respect to the benefits plan itself and the other punishes an improper action taken with respect to the individual's employment status." *Hinton v. Pacific Enterprises*, 5 F.3d 391, 394 (9th Cir. 1993).

Defendants' argument is based on two incorrect assumptions of the law. The first is the

1 assumption that determining whether Plaintiff's claims are based upon distinct wrongs is a
 2 "threshold" inquiry that precedes California's three-part test to determine whether a claim should
 3 be equitably tolled. In *Cervantes v. City of San Diego*, the Ninth Circuit reversed the district court
 4 for concluding that two claims were not 'substantially similar' without applying the three-part
 5 equitable tolling test:

6 "[S]imilarity" of the prior and current claims is a matter best
 7 determined following, and on the basis of, the application of the
 8 three-part equitable tolling test established by California law.
 9 Although we have previously stated that "equitable tolling is not
 10 applicable when a plaintiff has pursued a remedy as to only one of
 11 several distinct wrongs," *Donoghue*, 848 F.2d at 931, we have never
 12 suggested that in reaching that determination the district court may
 13 bypass the traditional method for determining California equitable
 14 tolling issues. It is the application of California's equitable tolling
 15 test itself that yields the "final" conclusion as to whether two claims
 16 are "similar" enough that the pendency of the one should toll the
 17 limitations period for the other. Although "similarity" often serves
 18 as a shorthand designation of the outcome of the test, it is neither
 19 separable from nor a "threshold" to the requisite three-part inquiry.
 20 Application of the three-part test is mandatory.

21 5 F.3d 1273, 1275-76 (9th Cir. 1993). Moreover, when the Ninth Circuit sat *en banc* in *Daviton*,
 22 the court overruled a previous Ninth Circuit decision—*Fobbs V. Holy Cross Health System*
 23 *Corporation*, 29 F.3d 1439 (9th Cir. 1994)—which imposed an additional "threshold" requirement
 24 to California's equitable tolling test that plaintiff's two claims seek similar "remedies." *Daviton*,
 25 241 F.3d at 1133. In doing so, the *en banc* court held that "*Cervantes* properly sets forth the
 26 California law on equitable tolling," *see id.*, and further quoted *Cervantes* for the proposition that
 27 "[s]imilarity" is a legal conclusion that follows from the mandatory application of the 'equitable
 28 tolling test.'" *Daviton*, 241 F.3d at 1140 (quoting *Cervantes*, 5 F.3d at 1276).

29 The Court recognizes that in *Lucchesi*, a three-judge panel of the Ninth Circuit wrote that
 30 "[i]f a plaintiff's first claim and second claim concern different wrongs, however, equitable tolling
 31 is not available and the three-pronged test is not applied." *Lucchesi*, 353 F.3d at 695 (citing *Loehr*
 32 *v. Ventura Cnty. Comm. College Dist.*, 147 Cal.App.3d 1071 (1983); *Arnold v. United States*, 816
 33 F.2d 1306 (9th Cir. 1987). The *Lucchesi* court cited two cases—*Loehr* and *Arnold*—purportedly in
 34 support. Nevertheless, while *Loehr* and *Arnold* both consider whether two claims involve distinct

wrongs, neither case stands for the proposition that this determination is separate from the three-part test. To the contrary, both courts reference the three-part test and simply proceed to consider whether two claims are based on distinct wrongs. *See Loehr*, 147 Cal.App. at 1084; *Arnold*, 816 F.2d at 1312-13. Moreover, the Ninth Circuit, like this Court, must apply California's law governing the equitable tolling doctrine. *Davison*, 241 F.3d at 1131. Because this Court is unaware of any California case which makes the determination of distinct wrongs separate from California's traditional three-part equitable tolling test, the Court follows *Cervantes* and considers whether Plaintiff's claims are based on distinct wrongs through application of the three-part test.

However, before doing so, the Court must correct Defendant's second faulty assumption. Contrary to Defendants' contention, the Ninth Circuit in *Hinton* did not hold that, for purposes of equitable tolling, the facts forming the basis of a Section 502 and Section 510 claim must necessarily constitute "distinct wrongs." *See Hinton*, 5 F.3d at 394. Rather, in the context of deciding which statute of limitations should be applied to a Section 510 claim, and in rejecting the plaintiff's argument that "because § 510 incorporates enforcement under § 502, the same statute of limitations used in § 502 should be adopted," the court reasoned that the statute of limitations from Section 502 did not apply because Sections 502 and 510 "remedy different wrongs." *Id.*

When addressing the *equitable tolling* issue in *Hinton*, the court held that the plaintiff's claim for retaliatory discharge was a distinct wrong from the plaintiff's claim under Section 510 regarding unlawful termination intended to interfere with the plaintiff's rights to receive benefits. *Hinton*, 5 F.3d at 396. In other cases, the Ninth Circuit and California Court of Appeal have similarly held that the presentation of one claim did not equitably toll another claim that was based on a "distinct wrong." *See Arnold*, 816 F.2d at 1313 (filing of Title VII claims for sexual harassment and discrimination did not toll state tort claims for assault, battery, false imprisonment and intentional infliction of emotional distress); *Loehr*, 147 Cal.App.3d at 1085 (filing of various state law claims "based upon a set of facts independent of those set forth" in a untimely filed § 1983 claim did not toll the § 1983 claim); *Aerojet General Corporation v. Superior Court*, 177 Cal.App.3d 950 (1986) (filing of a worker's compensation claim for personal injury did not equitably toll the limitations period for a claim for fraudulent concealment); *but see Lucchesi*, 353

1 F.3d at 694-95 (reversing summary judgment in favor of defendant because the pursuit of state
2 law claims tolled the statute of limitations for a § 1983 claim which “echoe[d] the allegations
3 made in the tort claim”).

4 What is noticeably absent these cases, however, is any indication that because two claims
5 are based on different laws—such as Section 510 and Section 502—the claims would necessarily
6 constitute “distinct wrongs.” Indeed, the Ninth Circuit has held that “[t]he fact that two claims
7 may be separate, distinct and independent insofar as they are founded upon *different laws*, involve
8 different procedures or seek different remedies does not compel the conclusion that they arise
9 from separate wrongs.” *Lucchesi*, 353 F.3d at 694-95 (emphasis added). The Ninth Circuit has
10 further stated that, “[i]n terms of the underlying policies of the statutes of limitation, it is irrelevant
11 whether those two claims are alternative or parallel, consistent or inconsistent, compatible or
12 incompatible.” *Daviton*, 241 F.3d at 1138 (quoting *Collier*, 142 Cal.App.3d at 925-26). Rather,
13 “determining the applicability of equitable tolling necessitates resort to the specific circumstances
14 of the prior claim: parties involved, issues raised, evidence considered, and discovery conducted.”
15 *Daviton*, 241 F.3d at 1140 (quoting *Cervantes*, 5 F.3d at 1276). With this background, the Court
16 applies California’s equitable tolling test to the facts of this case.

17 a. Timely Notice

18 The first prong, timely notice, “requires that plaintiff have filed the first claim within the
19 statutory period” and “alert the defendant in the second claim of the need to begin investigating
20 the facts which form the basis for the second claim.” *Daviton*, 241 F.3d at 1138 (internal
21 quotations omitted). “No specific type of notice is required ... as long as defendant has adequate
22 opportunity to gather and preserve evidence.” *Id.* at 1139 (citing *Elkins v. Derby*, 12 Cal.3d 410,
23 415 (1974) (in bank)).

24 Here, Plaintiff’s submission of his claim for benefits on December 20, 2010 was timely. In
25 his claim, Plaintiff wrote: “As Wells Fargo is no doubt aware, refusing to renew an HIB visa is
26 equivalent to a termination,” which entitles Plaintiff to severance benefits under the Plan. Eggers
27 Decl. Ex. A at 104. Thus, upon the submission of Plaintiff’s claim for benefits, Defendants were
28 aware that Plaintiff believed he was owed severance benefits as a result of the Policy, even though

1 he was not formally laid off or terminated. By this time, Defendants were also aware that Plaintiff
 2 believed the Policy “discriminated against [] foreign nationals,” as Plaintiff had indicated such in
 3 his exit interview. Eggers Decl. Ex. A at 35. While Defendants note that Plaintiff did not argue in
 4 his claim that the Policy was “intended to interfere” with benefits, Plaintiff was not required to cite
 5 the language or purpose of Section 510 so long as his first claim put Defendants on notice “of the
 6 need to begin investigating the facts which form the basis for the second claim.” *Daviton*, 241
 7 F.3d at 1138. Plaintiff did just that by submitting his claim for benefits.

8 b. Prejudice

9 The second requirement is that there is no “prejudice to the defendant in gathering
 10 evidence to defend against the second claim.” *Lucchesi*, 353 F.3d at 694-95 (citing *Collier*, 142
 11 Cal.App.3d at 924. This requirement is satisfied if “the facts of the two claims [are] identical or at
 12 least so similar that the defendant’s investigation of the first claim will put him in a position to
 13 fairly defend the second.” *Daviton*, 241 F.3d at 1138 (quoting *Collier*, 142 Cal.App.3d at 925).
 14 The claims need not be identical. “So long as the two claims are based on essentially the same set
 15 of facts timely investigation of the first claim should put the defendant in position to appropriately
 16 defend the second.” *Daviton*, 241 F.3d at 1138 (quoting *Collier*, 142 Cal.App.3d at 925-26).
 17 “The critical question is whether notice of the first claim affords the defendant an opportunity to
 18 identify the sources of evidence which might be needed to defend against the second claim.”
 19 *Collier*, 142 Cal.App.3d at 925.

20 The Court finds that Defendants will not be prejudiced if Plaintiff is allowed to proceed on
 21 his Section 510 claim. When Plaintiff submitted his claim for benefits, he put Defendants on
 22 notice that he believed he was entitled to benefits on the basis that he would be ineligible to
 23 continue working as a result of Wells Fargo’s Policy not to renew H-1B visas. Plaintiff’s two
 24 claims are “based on essentially the same set of facts.” *Collier*, 142 Cal.App.3d at 925. There is a
 25 substantial overlap between the evidence needed to prove non-entitlement to benefits as a result of
 26 the Policy and the evidence needed to prove that Defendants did not implement the Policy to
 27 interfere with benefits. While Defendants contend these claims entail “separate universes of
 28 evidence,” Reply at 12, that is simply not true. Both claims involve Wells Fargo’s Policy not to

renew H-1B visas as well as Plaintiff's entitlement to benefits. Thus, Plaintiff provided Defendants with the "opportunity to identify the sources of evidence which might be needed to defend against" the Section 510 claim. *Id.*

c. *Good Faith and Reasonable Conduct*

The final requirement is that Plaintiff exercised "good faith and reasonable conduct" in filing the second claim. *Lucchesi*, 353 F.3d at 694-95 (citing *Collier*, 142 Cal.App.3d at 924). Plaintiff filed his Section 510 claim simultaneously with his Section 502 claim on March 19, 2012. Before Plaintiff was able to file his Section 502 claim, however, he was required to exhaust all administrative remedies by submitting a claim for benefits and appeal with the Plan Administrator for Wells Fargo's severance Plan. Plaintiff exhausted his administrative remedies for the Section 502 claim on September 1, 2011. Thus, if Plaintiff were to file his Section 510 claim by the end of the applicable statute of limitations period, in April 2011, he would have had to file two separate lawsuits.

As explained by the California Supreme Court in *Elkins*, "an awkward duplication of procedures is not necessary to serve the fundamental purpose of the limitations statute[.]" *Elkins*, 12 Cal.3d at 412. In allowing one claim to be equitably tolled based on the timely filing of another claim, the *Elkins* court considered "the inequity that a duplicative filing requirement might work upon an injured party," and noted that "duplicative proceedings are surely inefficient, awkward and laborious." *Elkins*, 12 Cal.3d 410, 420 (1974). Considering the fact that Plaintiff had no choice but to delay the filing of his Section 510 claim in order to proceed in one lawsuit, there is no basis to conclude in that Plaintiff's actions were anything but reasonable and in good faith. Accordingly, Plaintiff's Section 510 claim will be equitably tolled.

2. *The Merits of Plaintiff's Section 510 Claim*

Defendants also argue they are entitled to summary judgment on Plaintiff's Section 510 claim because Plaintiff's evidence does not show that Wells Fargo discriminated against Plaintiff for the purpose of interfering with his severance benefits. When the challenged act in a Section 510 claim is discrimination, a plaintiff must "put forth sufficient evidence to establish [Wells Fargo's] specific intent to interfere with [his] benefit rights." *Lessard v. Applied Risk*

1 *Management*, 307 F.3d 1020, 1025 (9th Cir. 2002). A plaintiff may do so by presenting direct
2 proof of discrimination, or in the absence of direct proof, circumstantial evidence of
3 discrimination using the *McDonnell Douglas* burden-shifting framework applied in Title VII and
4 ADEA claims. *Id.* (citing *Ritter v. Hughes Aircraft Co.*, 58 F.3d 454, 457 (9th Cir. 1995)). The
5 question in this case is whether Plaintiff has submitted sufficient evidence of discrimination—either
6 direct or circumstantial—to show a genuine issue of material fact which precludes summary
7 judgment on Plaintiff’s Section 510 claim.

8 **i. Direct Evidence of Discrimination**

9 The Ninth Circuit found direct evidence of discrimination with regard to a Section 510
10 claim in *Lessard*. The plaintiff in *Lessard* was an employee of Applied Risk Management, Inc.
11 (“ARM”) who became a non-active employee on workers’ compensation leave prior to the
12 purchase of all ARM’s assets by PRM/MMI, another company. *Lessard*, 307 F.3d at 1022. Under
13 the purchase agreement, ARM employees were automatically transferred to active employment
14 with PRM/MMI coincident with the execution of the sale, and were covered under PRM/MMI’s
15 welfare benefits plan without an interruption in coverage. *Id.* There was one condition, however,
16 to each employee’s automatic transfer to employment with PRM/MMI: “In order to be eligible for
17 transfer, the employee had to be actively employed by ARM (i.e., ‘at work’) on the day of the sale
18 or on non-medical, non-extended leave from active employment.” *Id.* “However, the Agreement
19 excepted from the condition employees who were on vacation or who had taken a personal day
20 and thus were not ‘at work’ on [the day of the sale].” *Id.*

21 While the purchase agreement provided that non-active employees would become eligible
22 for transfer if and when they returned to active employment, the plaintiff in *Lessard* could not
23 return to active employment due to her medical condition. Meanwhile, the plaintiff’s benefits
24 were terminated because the terms of the purchase agreement precluded the plaintiff from being an
25 employee of PRM/MMI. The Ninth Circuit found that the condition in the purchase agreement
26 excluding from automatic transfer to PRM/MMI employees on medical and extended leave was
27 discriminatory on its face:
28

Here, Lessard's proof of discrimination is direct and uncontroverted. Section 7.2(a) of the Agreement facially discriminates against employees who were on disability, workers' compensation, and any other form of extended leave, explicitly excepting from its separate schedule for conditional transfer any employee who was absent from work due to vacation, holiday, or personal reasons. At the time the companies executed the Agreement, they knew that five of the six employees placed on the deferred schedule were on some form of medical leave or disability-related leave. We find that this conduct constitutes discrimination on its face.

Id. at 1025-26.

Plaintiff contends that under *Lessard*, the Court should find that Wells Fargo's Policy not to renew H-1B visas was discriminatory on its face and intended to interfere with the rights of H-1B visa holders to receive severance benefits. Plaintiff cites the confidential memorandum sent to HR Managers charged with implementing the Policy, which states: "*The fact that Wells Fargo has chosen not to sponsor a team member for an employer-sponsored visa does not trigger salary continuation benefits.*" Goddard Decl. Ex. 8. Wells Fargo contends the Policy cannot be discriminatory on its face because unlike in *Lessard*, the Policy does not even mention severance benefits.

As a preliminary matter, the Court disagrees with Wells Fargo's contention that the Policy does not mention severance benefits. No single document describes the full scope of the Policy, thus all documents discussing the Policy will be considered. Several documents, such as the confidential memorandum sent to HR Managers, show that Wells Fargo decided that those affected by the Policy would not be eligible for benefits if they were not otherwise selected for displacement. *See, e.g.*, Goddard Decl. Exs. 7-8. Moreover, the "Displacement Selection Process for Team Members on Employer-sponsored Visas and Student Visas" describes the process by which visa holders were incorporated into Wells Fargo's general displacement process. *See* Hurley Decl. Ex. B. Some employees affected by the Policy received severance benefits, such as those who were selected for displacement and whose work authorization expired after the end of the Notice Period. *See id.* at 414; Eggers Decl. ¶ 6. Other employees affected by the Policy did not receive severance benefits, such as those who may have been selected for displacement but whose work authorization expired before the end of the Notice Period. Hurley Decl. Ex. B. at

1 414; Goddard Decl. Ex. 8.

2 Nevertheless, a policy is not discriminatory on its face merely because it explicitly states
3 certain employees will not receive severance benefits. *Lessard* does not stand for the proposition
4 that whenever someone is explicitly denied benefits, there is direct evidence of discrimination.
5 Rather, the Ninth Circuit found facial discrimination in *Lessard* because the purchase agreement
6 directly referenced employees on medical and extended leave and explicitly excluded them from
7 automatic transfer of employment from ARM to PRM/MMI, which had the effect of terminating
8 their welfare benefits. *Lessard*, 307 F.3d at 1022. The purchase agreement explicitly targeted
9 employees on medical and extended leave and precluded them from uninterrupted coverage.

10 Here, however, Wells Fargo's Policy does not explicitly exclude all employees affected by
11 the Policy from receiving benefits. Rather, the "Displacement Selection Process for Team
12 Members on Employer-sponsored Visas and Student Visas" shows that some employees affected
13 by the Policy would receive benefits, and some would not, depending on whether they were
14 selected for displacement and the expiration date of their work authorization. *See* Hurley Decl.
15 Ex. B. Moreover, while it is true that Wells Fargo decided all employees affected by the Policy
16 and not selected for displacement would not receive severance benefits, this is not direct evidence
17 of discrimination. "Direct evidence, if found to be true, is conclusive of the facts testified to."
18 *McKenzie v. Risley*, 842 F.2d 1525, 1562 (9th Cir. 1988). Wells Fargo's decision could reflect an
19 administrative decision merely implementing a neutral Policy. Thus, the fact Wells Fargo
20 determined some of those employees affected by the Policy were not entitled to benefits is not
21 itself direct evidence of discrimination.

22 **ii. Circumstantial Evidence of Discrimination**

23 Even if the Policy does not constitute direct evidence of discrimination, Plaintiff may
24 submit circumstantial evidence to preclude summary judgment in favor Wells Fargo. Under the
25 *McDonnell Douglas* framework, a plaintiff must first present a prima facie case of discrimination,
26 which results in a presumption that the employer unlawfully discriminated against the employee.
27 *Lessard*, 307 F.3d at 1025 n. 3. If the plaintiff establishes a prima facie case, the burden then
28 shifts to the defendant to present a legitimate, nondiscriminatory reason for the adverse

employment action. *Id.* If the defendant meets this burden, the burden then shifts back to the plaintiff to show that the defendant's proffered reason is pretext for discrimination. *Id.*

a. *Prima Facie Case*

In the context of a Section 510 claim, a plaintiff may establish a prima facie case by showing: "(1) an employee participates in a statutorily protected activity, (2) an adverse employment action is taken against him or her, and (3) a causal connection existed between the two." *Kimbrow v. Atlantic Richfield Co.*, 889 F.2d 869, 881 (9th Cir. 1989). Wells Fargo argues that Plaintiff cannot meet any element of his prima facie case.

The "statutorily protected activity" in this case was Plaintiff's participation in the Plan. Wells Fargo argues that Plaintiff cannot establish this first element because after his voluntary departure from Wells Fargo in February 2010, Plaintiff lost participant status under the Plan. This argument is without merit. For the same reason Plaintiff's Section 510 claim accrued in April 2009 when Plaintiff learned about the Policy, the relevant question here is whether Plaintiff participated in statutorily protected activity when the adverse employment action—the alleged discrimination—occurred. Plaintiff was eligible for benefits, and thus participated in statutorily protected activity, when the Policy was implemented in April 2009. The Committee recognized this when they wrote "that during April 2009, Mr. Karamsetty met the eligibility requirements to be considered a Plan participant." Eggers Decl. Ex. A at 251. Thus, Plaintiff has met the first element of his prima facie case.

Next, Wells Fargo argues that Plaintiff suffered no adverse employment action because Wells Fargo did not terminate his employment. Rather, Wells Fargo contends that because Plaintiff voluntarily left Wells Fargo, he cannot establish any adverse employment action unless he meets the standard for showing a constructive discharge, which "is implicated only where an employer creates conditions so intolerable that a reasonable person would resign." *Fischer v. Andersen Corp.*, 483 F.3d 553, 556 (8th Cir. 2007). This argument is also meritless. Plaintiff does not need to show intolerable conditions or even that he was constructively discharged. The prima facie case for a Section 510 claim is satisfied when a plaintiff provides evidence of an act which would interfere with his benefits. In this case, the Policy satisfies this element by its

terms—Plaintiff would not be eligible for benefits when his visa expired. That is an adverse employment action.

The final element of Plaintiff’s prima facie case is the causal connection between the statutorily protected activity and the adverse employment action. On the one hand, “ERISA provides no relief if the loss of an employee’s benefits was incidental to, and not the reason for, the adverse employment action.” *Lehman v. Prudential Ins. Co. of Amer.*, 74 F.3d 323, 330-31 (1st. Cir. 1996). On the other hand, “[a] plaintiff is not required to prove that interference with ERISA rights was the sole reason for the discharge but must show more than the incidental loss of benefits as a result of the discharge.” *Gitlitz v. Compagnie Nationale Air France*, 129 F.3d 554 (11th Cir. 1997).

This element is easily satisfied. Plaintiff’s eligibility for benefits was cut off when the Policy was implemented.⁶

b. Wells Fargo’s Nondiscriminatory Reason

Having established his prima facie case of discrimination, the burden of production, but not the burden of persuasion, shifts to Wells Fargo to present a legitimate, nondiscriminatory reason for the adverse employment action. *Lessard*, 307 F.3d at 1025 n. 3; *Texas Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254 (1981) (“The defendant need not persuade the court that it was actually motivated by the proffered reasons.”). Wells Fargo argues that it implemented the Policy “[d]ue to the increased talent pool within Wells Fargo and the United States, Wells Fargo chose to only sponsor H1-B visas affirmatively where necessary for the line of business.” Motion at 21. Ms. Hurley writes in her declaration that “[t]he purpose of the Policy was to decrease Wells Fargo’s reliance on employer-sponsored visas by utilizing the overall increased talent pool of individuals within Wells Fargo as a result of its merger with Wachovia Corporation, and within the United States, who did not require visa sponsorship to work in the United States.” Hurley Decl. ¶ 3. The Court finds that Wells Fargo has satisfied its burden of stating a legitimate, nondiscriminatory reason for implementing the Policy.

⁶ The Court assumes, without deciding, that Plaintiff’s claim is not undermined by his resignation—which Plaintiff characterizes as a constructive discharge.

c. Pretext

The next inquiry is whether Plaintiff has presented sufficient evidence to show a disputed issue of material fact as to whether Wells Fargo's asserted reason for implementing the Policy is pretext for discrimination to interfere with benefits. *Lessard*, 307 F.3d at 1025 n. 3. There must be evidence "in addition to that which was sufficient for [a] prima facie case in order to rebut the defendant's showing." *Godwin v. Hunt Wesson, Inc.*, 150 F.3d 1217, 1220 (9th Cir. 1998). On summary judgment, the plaintiff's burden is "only to produce enough evidence that would allow a reasonable factfinder to conclude that the true reason for his discharge was a discriminatory one." *Nidds v. Schindler Elevator Corp.*, 103 F.3d 854, 859 (9th Cir. 1996). "Although a plaintiff may rely on circumstantial evidence to show pretext, such evidence must be both specific and substantial." *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1062 (9th Cir. 2002).

Plaintiff does not have sufficient evidence to permit a reasonable jury to find that Wells Fargo's true motivation for implementing the Policy was to interfere with severance benefits or that its nondiscriminatory reasons for implementing the Policy are pretext. A jury could not reasonably infer from the fact the Policy was implemented due in part to the "economic climate" that the Policy was driven by a desire to interfere with severance benefits. Hurley Decl., Ex. A. The Policy could save Wells Fargo on the costs of recruiting foreign workers, the costs of transportation for those workers, and the costs filing visa applications and extensions. These economic motivations are legitimate and nondiscriminatory under Section 510, which only proscribes conduct intended to interfere with benefits. Indeed, Wells Fargo paid severance benefits to several employees on visas who were selected as part of the displacement process. Eggers Decl. ¶ 6. This is indicative of Wells Fargo's nondiscriminatory intent.

There is also insufficient evidence of pretext in the fact that Wells Fargo decided, simultaneous with its decision to implement the Policy, that employees in Plaintiff's position would not be eligible for severance benefits. Implementing the Policy required Wells Fargo to undertake the administrative task of determining just how the Policy would be implemented. For the benefit of the company and its employees, Wells Fargo needed to foresee the Policy's impact on employees such as Plaintiff who were affected by the Plan but not included in the displacement

1 selection process. To make this decision on a broad scale, it was unnecessary for Wells Fargo's
2 legal department to consult with the Plan Administrator, as Plaintiff contends. The legal
3 department merely read the language of the Plan and correctly determined that such employees are
4 not eligible. This was an administrative business decision. It is unreasonable to infer from this
5 administrative act that Wells Fargo intended to discriminate against its employees' rights to
6 severance benefits.

7 **IV. CONCLUSION**

8 Accordingly, Defendants' Motion for Summary Judgment is GRANTED. The Clerk is
9 directed to close the file.

10 IT IS SO ORDERED.

11 Dated: August 7, 2013

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13 JOSEPH C. SPERO
14 United States Magistrate Judge
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